

AMENDED IN SENATE JULY 9, 2013
AMENDED IN SENATE JUNE 10, 2013
AMENDED IN ASSEMBLY MAY 23, 2013
AMENDED IN ASSEMBLY MAY 6, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 729

Introduced by Assembly Member Roger Hernández

February 21, 2013

An act to amend Sections 912 and 917 of, and to add Article 9.5 (commencing with Section 1048) to Chapter 4 of Division 8 of, the Evidence Code, relating to evidentiary privileges.

LEGISLATIVE COUNSEL'S DIGEST

AB 729, as amended, Roger Hernández. Evidentiary privileges: union agent-represented worker privilege.

Existing law governs the admissibility of evidence in court proceedings and generally provides a privilege as to communications made in the course of certain relations, including the attorney-client, physician-patient, and psychotherapist-patient relationship, as specified. Under existing law, the right of any person to claim those evidentiary privileges is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to a disclosure made by anyone.

This bill would provide that a union agent, as defined, and a represented employee or represented former employee have a privilege to refuse to disclose any confidential communication between the

employee or former employee and the union agent while the union agent was acting in his or her representative capacity, except as specified. The bill would provide that a represented employee or represented former employee also has a privilege to prevent another person from disclosing a privileged communication, except as specified. The bill would further provide that this privilege may be waived in accordance with existing law and does not apply in criminal proceedings.

This bill would incorporate additional changes to Section 912 of the Evidence Code made by this bill and AB 267, to take effect if both bills are chaptered and this bill is chaptered last.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 912 of the Evidence Code is amended to
2 read:
3 912. (a) Except as otherwise provided in this section, the right
4 of any person to claim a privilege provided by Section 954
5 (lawyer-client privilege), 980 (privilege for confidential marital
6 communications), 994 (physician-patient privilege), 1014
7 (psychotherapist-patient privilege), 1033 (privilege of penitent),
8 1034 (privilege of clergyperson), 1035.8 (sexual assault
9 counselor-victim privilege), 1037.5 (domestic violence
10 counselor-victim privilege), or 1048 (union agent-represented
11 worker privilege) is waived with respect to a communication
12 protected by the privilege if any holder of the privilege, without
13 coercion, has disclosed a significant part of the communication or
14 has consented to disclosure made by anyone. Consent to disclosure
15 is manifested by any statement or other conduct of the holder of
16 the privilege indicating consent to the disclosure, including failure
17 to claim the privilege in any proceeding in which the holder has
18 the legal standing and opportunity to claim the privilege.
19 (b) Where two or more persons are joint holders of a privilege
20 provided by Section 954 (lawyer-client privilege), 994
21 (physician-patient privilege), 1014 (psychotherapist-patient
22 privilege), 1035.8 (sexual assault counselor-victim privilege),
23 1037.5 (domestic violence counselor-victim privilege), or 1048
24 (union agent-represented worker privilege) a waiver of the right
25 of a particular joint holder of the privilege to claim the privilege

does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.

(c) A disclosure that is itself privileged is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1048 (union agent-represented worker privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, domestic violence counselor, or union agent was consulted, is not a waiver of the privilege.

SEC. 1.5. Section 912 of the Evidence Code is amended to read:

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 966 (*lawyer referral service-client privilege*), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of ~~clergyman~~ *clergy member*), 1035.8 (sexual assault counselor-victim privilege), ~~or~~ 1037.5 (domestic violence counselor-victim privilege), *or 1048 (union agent-represented worker privilege)* is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 966 (*lawyer referral service-client privilege*), 994 (physician-patient privilege),

1 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault
2 counselor-victim privilege), ~~or~~ 1037.5 (domestic violence
3 counselor-victim privilege), *or 1048 (union agent-represented*
4 *worker privilege)* a waiver of the right of a particular joint holder
5 of the privilege to claim the privilege does not affect the right of
6 another joint holder to claim the privilege. In the case of the
7 privilege provided by Section 980 (privilege for confidential marital
8 communications), a waiver of the right of one spouse to claim the
9 privilege does not affect the right of the other spouse to claim the
10 privilege.

11 (c) A disclosure that is itself privileged is not a waiver of any
12 privilege.

13 (d) A disclosure in confidence of a communication that is
14 protected by a privilege provided by Section 954 (lawyer-client
15 privilege), 966 (*lawyer referral service-client privilege*), 994
16 (physician-patient privilege), 1014 (psychotherapist-patient
17 privilege), 1035.8 (sexual assault counselor-victim privilege), ~~or~~
18 1037.5 (domestic violence counselor-victim privilege), *or 1048*
19 *(union agent-represented worker privilege)*, when disclosure is
20 reasonably necessary for the accomplishment of the purpose for
21 which the lawyer, *lawyer referral service*, physician,
22 psychotherapist, sexual assault counselor, ~~or~~ domestic violence
23 counselor, *or union agent* was consulted, is not a waiver of the
24 privilege.

25 SEC. 2. Section 917 of the Evidence Code is amended to read:

26 917. (a) If a privilege is claimed on the ground that the matter
27 sought to be disclosed is a communication made in confidence in
28 the course of the lawyer-client, physician-patient,
29 psychotherapist-patient, clergy-penitent, husband-wife, sexual
30 assault counselor-victim, domestic violence counselor-victim, or
31 union agent-represented worker relationship, the communication
32 is presumed to have been made in confidence and the opponent of
33 the claim of privilege has the burden of proof to establish that the
34 communication was not confidential.

35 (b) A communication between persons in a relationship listed
36 in subdivision (a) does not lose its privileged character for the sole
37 reason that it is communicated by electronic means or because
38 persons involved in the delivery, facilitation, or storage of
39 electronic communication may have access to the content of the
40 communication.

1 (c) For purposes of this section, “electronic” has the same
2 meaning provided in Section 1633.2 of the Civil Code.

3 SEC. 3. Article 9.5 (commencing with Section 1048) is added
4 to Chapter 4 of Division 8 of the Evidence Code, to read:

5
6 Article 9.5. Union Agent-Represented Worker Privilege
7

8 1048. (a) Except as required by subdivision (b), and subject
9 to Section 912, a union agent and a represented employee or
10 represented former employee have a privilege to refuse to disclose,
11 in any court or to any administrative board or agency, or in any
12 arbitration or other proceeding, any confidential communication
13 between the employee or former employee and the union agent
14 made while the union agent was acting in his or her representative
15 capacity. A represented employee or represented former employee
16 also has a privilege to prevent another from disclosing a
17 confidential communication between the employee and a union
18 agent that is privileged pursuant to this section.

19 (b) A union agent may use or reveal a confidential
20 communication made to the union agent while the union agent was
21 acting in his or her representative capacity in either of the following
22 circumstances:

23 (1) In actions against the union agent in his or her personal or
24 official representative capacity, or against the local union or
25 subordinate body thereof or international union of affiliated or
26 subordinate body thereof or any agent thereof in their personal or
27 official representative capacities.

28 (2) When, after full disclosure has been provided, the written
29 or oral consent of the bargaining unit member has been obtained
30 or, if the bargaining unit member is deceased or has been adjudged
31 incompetent by a court of competent jurisdiction, the written or
32 oral consent of the bargaining unit member’s estate or guardian
33 or conservator.

34 (c) A union agent shall use or reveal a confidential
35 communication made to the union agent while the union agent was
36 acting in his or her representative capacity if required to do so by
37 a court order.

38 1048.1. For purposes of this article, the following terms have
39 the following meanings:

(a) “Confidential communication” means information transmitted, by oral or written communication, between a represented employee or represented former employee and a union agent and in confidence by a means which, so far as the employee, former employee, or union agent is aware, discloses the information to no third persons other than those who are present to further the interest of the employee, former employee, or union agent or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the communication was made, and includes advice given by a union agency in the course of a representational relationship.

(b) “Union agent” means a person employed, elected, or appointed by a labor organization and whose duties include the representation of employees in a bargaining unit in a grievance procedure or in negotiations for a labor agreement and the labor organization. An appointed employee steward is not a union agent except to the extent a represented employee or represented former employee communicates in confidence to the steward regarding a grievance or potential grievance.

1048.2. There is no privilege under this article if the union agent reasonably believes that disclosure of any confidential communication is necessary to prevent a criminal act that the union agent reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

1048.3. There is no privilege under this article with respect to a confidential communication made to enable or aid a person in committing, or planning to commit, a crime or fraud.

1048.4. The privilege established under this article does not apply in criminal proceedings.

SEC. 4. Section 1.5 of this bill incorporates amendments to Section 912 of the Evidence Code proposed by both this bill and AB 267. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2014, (2) each bill amends Section 912 of the Evidence Code, and (3) this bill is enacted after SB 267, in which case Section 1 of this bill shall not become operative.